restrictions assure, among other things, a consistent and pleasing facade and aesthetics on all buildings in an area. For example, buildings in a certain area may be required to meet common design and aesthetic criteria (which may be carefully specified); common setbacks may be prescribed to preserve open space; the types and quality of exterior construction materials may be severely limited; signage may be severely restricted; and owners may be required to maintain their properties at a very high level. These attempts to combat urban blight by creating a consistent, harmonious environment attractive to business people, shoppers and residents can be thwarted if any tenant or landowner with impunity can place large numbers of microwave-type dishes on the exterior of a building or property.

44. The federal government has recognized such considerations for its own properties by requiring that personal wireless facilities (which include facilities of the type covered by the NOPR) be placed "in accordance with federal, state and local laws and regulations." 61 Federal Register No. 62 (March 29, 1996) at 14,101.

45. Under CEQ Rules environmental effects include aesthetic, historic, cultural, economic, social, and health effects whether direct, indirect or cumulative. 40 C.F.R. § 1508.8. Preventing urban blight and its related increase in health, safety, crime, welfare, drug and other problems thus is an environmental effect under CEQ Rules. The proposed rule would directly affect such matters. An EIS is required.

46. When it originally adopted its environmental rules, this Commission "stressed the visual or aesthetic impact of [communications] facilities as their primary environmental effect." First Report and Order at 37. Aesthetic concerns are an important part of zoning considerations

directly and due to the consequent effects they have on property values, blight and the others matters just described. The proposed rule directly effects aesthetics. An EIS is required.

47. Asbestos Abatement: As is set forth below in Sections 56 and following below compliance with zoning codes and their requirements as a practical matter often insures compliance with state, federal and local regulations relating to asbestos such as surveying for asbestos in the area of a proposed installation and using an accredited asbestos abatement contractors. An exemption which impacts such enforcement of asbestos related matters requires an EIS.

48. Section 332(c)(7): Section 332(c)(7) of the Communications Act of 1934 was added in 1996. In general it preserves local zoning and other authority over "personal wireless service facilities." Other than setting RF radiation standards the Commission is denied any role with respect to personal wireless service facilities (Federal relief is confined solely to the Federal courts). 332(c)(7)(B)(v). Specifically, Section 332(c)(7) states that "nothing in this Act shall limit the authority of a state or local governments or instrumentality thereof--over decisions regarding the placement, construction and modification of personal wireless service facilities" other than the restrictions set forth in Section 332(c)(7)(B) (emphasis added). Section 332 removed any basis for Commission preemption or rule-making authority affecting state or local governments related to personal wireless service facilities.

49. Despite the clear language of Section 332, industry commenters have contended that at least some fixed wireless facilities are not "personal wireless service facilities" under Section 332(c)(7) and that the Commission may adopt the proposed rule described in the NOPR or take other action. *See, e.g.* Comments of the Wireless Communications Association International at 9,

fn. 14; Further Reply Comments of the Wireless Communications Association International, Inc. at 14-18.

50. Congress found that the principles set forth in Section 332(c)(7) provide an appropriate balance between the need for the prompt provision of wireless service and local zoning requirements. Particularly given that there has been no demonstration of any actual adverse impact of zoning regulations on fixed wireless facilities, the Commissions' adoption of separate rules for those fixed wireless facilities, if any, that are outside the scope of Section 332(c)(7) is highly controversial; violates prior Commission orders which on environmental grounds give primacy to local zoning control; and is precedent setting. An EIS is required.

Preemption of Asbestos Regulation

51. As is well known, asbestos has been determined by the U.S. government to be a cancer-causing material. The United States Environmental Protection Agency ("U.S. EPA") adopted an asbestos ban and phase-out regulations in 1989. Many buildings built prior to that date–perhaps a quarter to one-half of buildings nationwide–contain asbestos in floor and ceiling tiles, roof insulation, and roofing materials. However, in 1991, the U.S. Court of Appeals remanded to the U.S. EPA all but six of the U.S. EPA's asbestos related regulations. This had the effect of largely lifting the prior U.S. EPA ban on the production and sale of most asbestos-containing products. Manufacturers are not required to label products as containing asbestos.

52. The Court of Appeals decision has resulted in many products containing asbestos continuing to be used and incorporated in both old buildings (repairs) and new buildings (new construction) nationwide. For example, one recent product survey found that twenty percent (three

out of fifteen) of products purchased from three different home improvement retail stores in the Kalamazoo, Michigan area in June 1999 contained asbestos. One of the three products was a wet/dry roof cement. *Without warning: Survey reveals unlabeled asbestos in products,* CAM Magazine, December 1999, at 38. As another example, Philip King, Regional Asbestos Coordinator for U.S. EPA Region V in Chicago, estimates that as many as 3,500 asbestos-containing products are being sold in the United States today and may not be labeled as containing asbestos. *Id.*

53. The Federal government regulates asbestos through the Occupational Safety and Health Act ("OSHA") and the Asbestos Hazard Response Act of 1986, Pub. L. No. 99-519, 100 Stat. 2970, 15 USC §§ 2641 et seq. ("AHERA") which is aimed at reducing asbestos hazards in schools. OSHA regulations require training for workers conducting repair, maintenance, and related work where asbestos-containing materials ("ACM") may be disturbed, and require building owners to notify all employees who will work within or adjacent to ACM of the presence, location, and quantities of ACM. 29 C.F.R. § 1926.1101. U.S. EPA regulations on asbestos also set forth actions K through grade 12 public and private schools must take in response to ACM, established the framework for the accreditation of individuals for asbestos removal, 40 C.F.R. Part 763, and regulated the renovation of buildings that contain ACM. 40 C.F.R. Part 61.

54. Many states have similar statutes and regulations. Michigan for example, requires the licensing of asbestos abatement contractors, MCLA §§ 338.3101 et seq., and the accreditation and proper training of persons who perform asbestos-related work on public and commercial buildings, which include residential apartment buildings and condominiums of 10 or more dwelling units.

MCLA §§ 338.3401 et seq. Other state and local governments may go further and require the removal of ACM if construction activity would result in it being disturbed.

55. The proposed rule threatens these state and local statutes and regulations relating to asbestos and human health because Rule 1.4000 prohibits "any restriction . . . that impairs the installation, maintenance, or use of" the antennas or wires in question. 47 C.F.R. § 1.4000(b). This is because (as indicated above) between one-quarter to one-half of buildings constructed prior to 1989 contain asbestos in roof insulation, roofing materials or floor or ceiling tiles and many new buildings contain asbestos materials in similar places as well. The installation of wireless antennas on roofs in many instances will thus involve work disturbing asbestos-containing materials in the roofing materials and insulation. The installation of wires through walls, floors and ceilings to connect users to either antennas on roofs or ground floor utility entrances will similarly disturb asbestos-containing materials in many cases. If the proposed rule is adopted, under Star Lambert, state and local enforcement of the asbestos-related requirements described above would be preempted and injury and death will result. At minimum an EIS is required to identify the state and local regulations concerning asbestos that would be preempted; quantify the impact on human health of their preemption; and consider means to minimize such health impacts.

56. Relatedly, zoning ordinances and safety codes, with their permitting and approval requirements and agreements under them, often protect against hazardous substances where there is inadequate or insufficient state or federal regulations or enforcement of same. This is generally true for asbestos where local zoning approvals, site plan approvals, building permits, safety code approvals and the like can be and often are conditioned upon surveying for ACM and using

accredited asbestos abatement contractors, if a renovation or the installation of items such as wires or antennas would disturb ACM. Under the proposed rule, the provisions of such zoning and safety regulations intending to protect the health and safety would be prohibited as to telecommunications providers, antennas that they install and the wires they install to connect users to roof top dishes or ground floor or basement network interface devices, riser cables and inside wires. This could affect the millions of U. S. buildings containing ACM and the health of many Americans. An EIS is required.

57. Unfortunately it does not appear that the preceding asbestos related matters are saved by the "legitimate safety objective" exemption of Rule 1.4000 (b) (1). This is because as noted above in its Star Lambert decision the Commission has specifically prohibited the enforcement of safety codes, including permit fees, fines for violation and the like. And the Wireless Communications Association International has expressly confirmed that it expects the Commission's Star Lambert decision to apply to any amendment to Rule 1.4000 to extend it to cover wireless facilities. See WCAI Further Reply Comments at 6-7 (October 22, 1999); Further Reply Comments of Concerned Communities and Organizations at 2-3 (October 28, 1999).

58. In addition, as noted above, the requirement to obtain local zoning approval, site plan approvals, building permits, safety code approvals and the like often have the effect of insuring compliance with state and local asbestos requirements both by revealing the presence of ACM and by conditioning any approvals on surveying for ACM and using a credited asbestos abatement contractors as described above. If the Commission proceeds as set forth in the proposed rule to exempt wireless providers from having to obtain local zoning approvals, site plan approvals,

building permits, safety approvals and the like, this will have the practical effect of preventing such providers from having to survey for ACM or use accredited asbestos abatement contractors. An EIS is thus required.

Peregrine Falcons Endangered by Rule

59. In August, 1999, the Peregrine falcon was removed from the Federal endangered species list. By giving telecommunications providers effectively unrestricted access to the rooftops and ledges that have become the preferred urban environment for the Peregrine falcon (and by effectively abrogating all laws and private agreements that would prevent or restrict telecommunication provider access to such premises), the NOPR threatens the recovery of the Peregrine falcon and may result in its again being placed on the endangered species list. Further information on these points is set forth below. An EIS is required.

60. In 1970, the American Peregrine falcon was listed as endangered under the Endangered Species Conservation Act of 1969 (the law preceding the statute currently in effect, the Endangered Species Act of 1973).

61. As reported (among other places) on August 20, 1999, by National Public Radio, a key development in the recovery of the Peregrine falcon was raising them on urban ledges and rooftops -- the exact places where the Commission is proposing to allow the placement of fixed wireless antennas by preempting all laws and restrictions preventing such placement:

> "Twenty-five years ago, there was not a single pair of Peregrine falcons east of the Mississippi River, so biologists took fledgling falcons, raised them in captivity and released them, first into mountain and coastal areas. Then, a few years later, they hit on a novel idea. David Wilcove is the Environmental Defense Fund's senior ecologist.

> Mr. DAVID WILCOVE (Environmental Defense Fund): Well, the original nesting habitat of the Peregrine falcon would be rocky ledges and cliff faces. When they disappeared from the East, it occurred to some people that it might be possible to convince them to nest on skyscrapers which, to a falcon, might look like a cliff face, and if they moved into the cities, they could eat all the pigeons, which are a fine food for Peregrine falcons. And so they began this reintroduction program in urban areas -- on top of skyscrapers, on top of bridges -- and it was phenomenally successful."

"Interior Department Declares the Peregrine Falcon Fully Recovered from its Status as an Endangered Species," All Things Considered, National Public Radio, August 20, 1999.

62. The National Public Radio broadcast covered the removal in August 1999 of the Peregrine falcon from the endangered species list. This removal was due in significant part to falcons nesting on ledges and rooftops of buildings. The broadcast gave a specific example of falcons that have nested for many years on the office building housing Legg Mason, an investment banking firm in Baltimore, Maryland. A transcript of the broadcast is attached as Exhibit B.

63. The importance of building ledges and rooftops for the Peregrine falcon is exemplified by the fact that Interior Secretary Bruce Babbitt started the process of removing the falcon from the endangered species list "with a high profile press conference on the roof of a Wall Street skyscraper. There, one of a dozen pairs of New York City Peregrines was raising chicks." *Symbol of Hope? The American Peregrine Falcon; Success Story*, 34 NATIONAL WILDLIFE 6, 36 (October 20, 1996). According to published accounts, at least ten percent of the Peregrine pairs nesting nationwide are city dwellers nesting on building ledges and towers in New York, Chicago, Washington, Detroit, Boston and Nashville. *Falcon Off Endangered Species List - Back On and Back On BB&T Roof*, NASHVILLE CITIZEN - TIMES at B1(August 24, 1999). As is apparent from the preceding, the

percentage of Peregrine falcons nesting on ledges and rooftops is higher east of the Mississippi than in the western United States.

64. The urban locations preferred by Peregrine falcons are many of the same locations preferred by fixed wireless providers. In particular, the ledges and rooftops on buildings where Peregrines nest are the areas where fixed wireless antennas[5] often are placed so as to have line of sight communication to the central transmission point(s) for the service.

65. The proposed rule threatens governmental and private restrictions which protect the urban nesting areas of the Peregrine falcon. This is because Rule 1.4000 prohibits "any restriction... that impairs the installation, maintenance or use of" the antennas in question (emphasis added). The type of restrictions banned under the rule expressly include, but are not limited to, state and local laws and regulations, private covenants, property restrictions and the like. Under the rule, "no civil, criminal, administrative or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule." The exemptions in the rule are only for "clearly defined, legitimate safety objectives" and historic sites. 47 CFR § 1.4000(b).

66. As described in part above, zoning codes and the detailed permits, permissions, variances, covenants and agreements under them have as one of their purposes the protection of environmentally sensitive areas. This includes nesting birds and their habitats such as the roofs and ledgetops preferred by the Peregrine falcon. Under the proposed rule, all the provisions of the

[5]Fixed wireless dishes are like microwave dishes or satellite dishes which have to be pointed at the central transmission site in order to work and for this reason often are placed high on buildings.

preceding zoning land use related matters intended to directly or indirectly protect such habitats would be prohibited.

67. In addition, the proposed Rule would: Preempt permitting requirements (which may be combined with ordinary safety code permitting requirements) which would require an applicant or a municipality to determine whether a proposed telecommunications antenna or facilities would be located in an area where Peregrine falcons nest or may potentially nest; Preempt permit conditions preventing work in nesting areas during the Peregrine falcon nesting and chick raising season, and; Under the Commission's Star Lambert/Meade Kansas line of cases prohibit permit and other fees necessary to cover and fund a municipality's cost of investigating and enforcing ordinances such as the preceding. More generally, municipal ordinances prohibiting work in sensitive bird nesting areas would be rendered unenforceable against telecommunications companies as would local and state laws intended to protect "important bird areas" to the extent that they limit telecommunications provider access to ledges and rooftops. *See*, for example, *Why Birds Love the Big Apple*, 37 NATIONAL WILDLIFE 2 (February 1999), which describes why birds such as Peregrine falcons love urban areas, the designation of important bird areas, the need to preserve critical avian habitats, and legislation such as the New York Bird Conservation Area Act, which protects such areas.

68. The proposed rule similarly would allow fixed wireless and other telecommunication providers access to the building ledges and rooftops used by Peregrine falcons over the objection of building owners who do not want such antennas on their buildings. In this respect, the building owners would not be able to prohibit access to particular ledges or sites or restrict or condition

access to sites suitable for or potentially useable by Peregrine falcons (such as prohibiting access during nesting season).

69. Peregrine falcon nesting spots are not always well known. The personnel installing and maintaining fixed wireless communication sites and equipment thus cannot readily know in advance which areas may have nesting falcons or whether their equipment is displacing falcons which might nest at that location in the future. Relatedly, construction crews and maintenance personnel sometimes (to put it mildly) are not environmentally sensitive. Their presence and actions can deliberately or inadvertently lead to harm to nesting Peregrine falcon pairs. The matters (preempted by the proposed Rule) described above guard against such harm.

70. The proposed rule threatens Peregrine falcons by prohibiting the laws and agreements described above which have the direct and indirect affects of protecting Peregrine falcons. Although the Peregrine falcon was removed from the Endangered Species Act list less than a year ago, it is not out of the woods. As discussed below, many states have their own endangered species acts. Under many of these the Peregrine falcon is still an endangered species and cannot be harmed. Such state environmental statutes would be preempted by the proposed rule, thus threatening the Peregrine falcon. An EIS is required to consider the extent to which the rule proposed in the NOPR would harm the Peregrine falcon or potentially return it to the list of endangered species, and to consider alternatives to the proposed rule.

Least Tern Endangered, Affected by Rule

71. The Least Tern is on the endangered species list.[6] It is a relative of the California Least Tern, also on the endangered species list, which inhabits California and Mexico. Both birds are referred to collectively herein as the "Least Tern."

72. Originally a shorebird, Least Terns now nest in major numbers on the gravel rooftops of buildings. This is due to human development of beaches (their original nesting sites) from which they have been displaced. See generally Jerome A. Jackson "Terns on Tar Beach" Natural History, July, 1994 pages 47 and following. In some states a majority of Least Terns now live on gravel roofs--from sixty one (61%) percent in South Carolina to seventy four (74%) percent in Maryland to ninety (90%) percent in Florida. Carolyn Shea "Terns Hit the Roof" Audubon Magazine, November-December 1997, Page 22; Krogh, Michael G. and Sara H. Schweitzer "Least Terns Nesting on Natural and Artificial Habitats in Georgia, USA" 22 Waterbirds, Volume 2 at pages 301-307 (1999). These percentages are increasing. Id.

73. Researchers say "rooftops are a crucial safety net for the species" which is "vulnerable to further decline." "Coastal Development Threatens Rare Atlantic Shorebird, According To New Study by University of Georgia Researchers," April 3, 1998 Research Communication from the University of Georgia Office of the Vice President for Research, copy attached as Exhibit D. Researchers on rooftop nesting sites for Least Terns say "these artificial nesting sites are crucial" Id.

[6]See printout from U.S. Fish and Wildlife service web page attached as Exhibit C.

74. The NOPR threatens the Least Tern by mechanisms similar to those by which it threatens the Peregrine falcon, namely by preempting public and private measures that would protect the Least Tern. For example, the NOPR preempts building codes, zoning laws, environmental laws or other state or local laws, regulations, and the covenants, restrictions, permits, fees, and permit fees associated with them, which have the effect of preserving rooftop habitats for Least Terns and preventing human incursions that would disrupt them. Similarly, by preempting landlords from preventing, restricting or conditioning access by telecommunications companies to the roofs of buildings the NOPR prevents landlords from taking measures to protect Least Terns on their property. To date private property owners have generally been receptive to and protective of Least Terns nesting on their roofs and tend to prevent strangers or outsiders from disrupting the birds. See "Terns on Tar Beach" supra (mall manager admonishes visitors against disturbing the birds); Krogh and Schweitzer, supra (most building owners are tolerant of roof colonies and will try to help them).

75. As an example of the types of local laws and restrictions affecting Least Terns that might be preempted, researchers recommend severely restricting access to rooftops housing Least Tern colonies:

> "Maintenance work should not be performed from 15 April to 1 August. Roof maintenance during the nesting season should be completed within one h[our] and should be performed before 1000 h[ours] [10 a.m.]or after 1700 h[ours] [5 p.m.]." Krogh and Schweitzer, supra at 306.

State and local laws and landlord policies implementing these recommendations and the other matters described above would be preempted by the proposed rule. An Environmental Impact Statement is required.

76. According to the U.S. Fish and Wildlife Service's Endangered Species Web Page, Least Terns inhabit nineteen states.[7] From the literature cited above there are also extensive colonies in Georgia, Maryland and South Carolina and colonies have been reported in other states as well. An EIS must thus examine the laws of the preceding 22 states and zoning, building code, environmental and other laws of their municipalities and landlord policies to determine the effect of their preemption on the Least Tern.

State Endangered Species Acts

77. Many states have endangered species acts. In general they prevent any harm to species the state determines to be endangered or threatened. The proposed rule would preempt such statutes which protect (among other things) the Peregrine falcon and Least Tern. An EIS is required.

78. To illustrate the endangered species acts adopted by many states, Municipal Petitioners will describe Michigan's act. Michigan's endangered species provisions are contained in Part 365 "Endangered Species Protection" of Michigan's Natural Resources and Environmental Protection Act. See MCLA § § 324.36501 and following ("Michigan Endangered Species Act"). In general "endangered species" under the Michigan Act "means any species of fish, plant or wildlife that is in danger of extinction throughout all or part of its range" and includes any member of the animal kingdom. MCLA § 324.36501. "Threatened Species" are those likely to become endangered. MCLA § 324.36501 (h). Michigan's Department of Natural Resources is required every two years to list those species that are endangered or threatened within the State of Michigan.

[7]Arkansas, Colorado, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Dakota, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Texas and California.

MCLA § 324.36503. Birds currently on Michigan's threatened or endangered species list include the Peregrine falcon and two species of Tern (Caspian Tern and Common Tern). Michigan Administrative Code R 299.1026. Wildlife on the Federal endangered or threatened species list are automatically included as endangered species in Michigan. MCLA § 324.36505 (1)(b).

79. The effect of a bird being listed as endangered or threatened under the Michigan Endangered Species Act is that all persons are prevented from, among other things, from "taking" such birds. The Act defines "taking" as including engaging in conduct which would "harm" the animal in question. MCLA §§ 324.36505 (1); 324.36501 (f). Violators are subject to criminal prosecution. MCLA § 324.36507.

80. Least Terns and Peregrine falcons, among others, are thus protected species under Michigan's Endangered Species Act. For the reasons described above, the proposed rule would preempt the State of Michigan from protecting such species against actions by telecommunications providers in installing wireless antennas on buildings which (as described above) would "harm" such birds in violation of Michigan law.

81. Simply by examining the laws of one state, Municipal Petitioners have shown two species which under state law are endangered or threatened and would be directly harmed by the proposed rule. One of these species–the Peregrine falcon–is now not an endangered species under Federal law and thus is not protected under the Federal Endangered Species Act. An EIS is required which must, among other things, examine the endangered species acts of all fifty states and the U.S. possessions to determine which species protected under such acts might similarly be harmed by the proposed rule and consider alternatives to the proposed rule.

82. Comprehensive EIS Required: Based largely on the mass media (e.g.–"All Things Considered" on National Public Radio), widely available publications (e.g.–Audubon Magazine, Natural History, National Wildlife), filings previously made in this docket, state statutes and regulations, and U.S. Government web sites Municipal Petitioners have shown severe environmental impacts of the proposed rule on endangered species, work on building materials containing asbestos and on public health and safety by preempting zoning codes and engineering related health and safety codes. There are likely other environmental impacts of the proposed rule beyond those revealed by the widely available sources just mentioned. The EIS on the proposed rule must comprehensively examine all environmental impacts of the proposed rule, including impacts set forth in less widely available sources.

NOI - Environmental Effects

83. A survey of many of the comments filed pursuant to the NOI reveal several common themes. Many of the telecommunications providers and industry associations have clearly coordinated their activities to identify and criticize certain local regulations. If the Commission promulgates rules preempting or limiting such local regulation, the result will be a significant effect on the human environment. Thus, an EIS is required.

84. Relocation Provisions: SBC Communications, Inc. ("SBC") and AT&T Corp. ("AT&T") among others, object to local ordinances that require providers to relocate their facilities at their expense where the existing facilities are incompatible with civic projects. Comments of

SBC Communications, Inc., October 12, 1999, at 6. Comments of AT&T Corp, October 12, 1999, at 19.

85. The following are only some examples of the health, safety and environmental effects of adopting a rule prohibiting the requirement that telecommunications providers relocate their facilities at their own expense. The environmental assessment and EIS which this Commission is required to prepare -- as well as the detailed processes involved in preparing such assessments and statements -- will reveal other health, safety and environmental impacts.

86. State and local units of government[8] typically include in their ordinances, permits, and agreements relating to the rights-of-way relocation provisions similar to the ones that SBC objects to. Such provisions, in combination with other provisions, in substance typically state that although the provider may occupy the rights-of-way, it has no "vested right" to any particular location therein and shall relocate its facilities therein (at its expense) as the state or local government may require for purposes of the public convenience or necessity. It may be of particular interest to this Commission that often such provisions recite that entities such as SBC and AT&T do not obtain any "vested rights" *vis a vis* any subsequent provider. Thus if crowding in the rights-of-way would

[8] This and subsequent sections of this petition refer to the actions, policies, or requirements of state and local units of government regarding public rights of way. This is because the Commission is being asked to interpret and apply sections of the 1996 Act which apply to "state or local" statutes, regulations, or other legal requirements relating to the public rights of way. *See* 47 U.S.C. § 253. The Commission, thus, must determine the environmental impact of its action on all such state and local units of government.

require SBC and AT&T to relocate their lines so as to allow a subsequent provider (who brings competition to the area) to provide service they can be required to do so at their expense.[9]

87. Relocation provisions are essential to protect the environment, health and safety. One example in this regard is a trunk or interceptor sewer line break. Trunk or interceptor sewers transport sewage from smaller sewer collections systems to treatment plants. They are often large enough in diameter that a car or truck can be driven through them. Such sewers can and do break. The consequences are highly adverse to the area and downstream water sources. Tens of thousands or millions of gallons of raw sewage per day can be spilled and flow untreated into waterways, flood the land and flood buildings and residences in low lying areas. And (as described below) relating to water mains due to the volume of sewage flowing, a sewer break can collapse nearby utilities (water, electric, gas, steam) and adjacent buildings.

88. To fix the break and restore sewer service municipalities frequently must require all utilities with facilities in the area to relocate their lines near the break (on an emergency basis) so that construction crews and heavy equipment can gain access to the break and access to surrounding areas which are being washed away by the flood of raw sewage. Preemption or restrictions such as SBC and AT&T are requesting would have an obvious immediate and severe impact on the public health, safety and the environment by preventing or delaying repairs. An EIS is thus required for the preemption requested by SBC and AT&T.

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[9] The preceding typically occurs where there are both relocation and "no priority of use" provisions in the law or agreement.

89. Water main breaks raise somewhat similar concerns.[10] Of concern here are both breaks in residential mains (4 inches to 24 inches in diameter) and in the much larger force mains which supply water to a wide area. The water in such mains is under high pressure and a break is analogous to turning loose a high pressure 24" to 40" fire hose underground, which washes away the street, roadway and adjacent soil and structures. The potential effects on the health, safety and environment include (1)–The loss of water (or sufficient water pressure) for fire protection (and consequent increase in fires) because fire hydrants are served by the municipal water system, (2)–The loss of potable water (or inadvertently providing contaminated water) to persons "downstream" of the break, and (3)–The erosion of supporting soil and structures for building foundations, as well as collapsing adjacent utilities such as sewer, gas, electricity and steam. As this Commission should be aware, washing away the soil around these other underground utilities can easily lead to the rupture of gas mains, steam mains, electric mains and the like with explosive, lethal consequences for inhabitants of the area and further damage to the utilities, people and area in question. Due to the loss of fire protection (as well as the public health risk) water main breaks often lead to the closure of all affected buildings–including offices, schools, industry, commercial and retail establishments.

90. For the reasons described above, relocation provisions are essential in laws and regulations relating to the rights-of-way to aid prompt repairs should a sewer or water main break occur. Preemption or restrictions such as SBC and AT&T are requesting would have an immediate

[10]See the discussion of the MCI-Auburn Hills, Michigan June 1999 watermain break, in paragraph __, infra.

and severe impact on the public health, safety, and the environment. Their request for preemption of such relocation provisions requires an EIS.

91. As is obvious safety concerns are a major reason state and local governments rebuild roads and highways and change their size, alignment and the like. Under current law utilities are typically required to relocate their facilities -- at their expense -- during any such highway reconstruction.[11] Proposing to give one entity (new telephone entrants) or a class of utilities (telecommunications providers) a vested right in a certain location in the rights of way from which they either cannot be removed at all or can only be removed at public expense -- such as by condemnation proceedings -- is highly unusual and will either prohibit or (by increasing construction costs) significantly limit states and local units of government in their ability to reconstruct highways to meet health, safety and environmental goals. For this reason, an EIS is required.

92. Freezing Statutes, Ordinances and Obligations. AT&T contends that municipalities should not be able to impose any requirements on new telecommunications providers that were not imposed on the incumbents when they entered the market. Comments of AT & T, *supra* at 30. Given that the incumbents generally started operation in the late nineteenth century, AT&T is thus asking this Commission to preempt over 100 years of state and local statutes and agreements relating to the public rights-of-way and telecommunications providers. Any requirements imposed

[11] As an example of state laws requiring utilities to relocate their facilities in the right of way at their expense, see Detroit Edison Co v City of Detroit, 180 Mich App 145, 446 N.W. 2d 615 (1989); Detroit Edison Co v Southeastern Michigan Transportation Authority, 161 Mich App 28, 410 N.W. 2d 295 (1987); Michigan Bell Telephone Co v City of Detroit, 106 Mich App 690, 308 N.W. 2d 608 (1981).

since (roughly) the Spanish-American War (1898), including health, safety, and environmentally-oriented requirements, would be prohibited. Stated otherwise, for the twenty-first century AT&T is thus contending that state and local laws and agreements relating to telecommunications providers and the rights-of-way must be rolled back to the horse and buggy era of the late nineteenth century! An EIS is required.

93. In this regard, Alexander Graham Bell invented the key elements of the modern telephone in 1875 and filed his historic patent application on February 14, 1876. Telephone service quickly spread across the country thereafter such that by the late nineteenth century most communities had telephone service. Some areas were served by the Bell system (and its predecessors); others were served by the thousands of independent phone companies that had sprung into existence.

94. As this Commission is well aware, in the late nineteenth century environmental laws and requirements were in their infancy, at best. Laws and requirements relating to health and safety were not very advanced compared to today's standards. There was a substantial expansion in health and safety laws at the turn of the century and again after 1960. Many of our nation's current environmental laws were enacted after 1965. AT&T's request would effectively repeal the last century's worth of state and local environmental, health and safety requirements as they apply to telecommunications providers. It would preempt or negate state and local health, safety and welfare regulations. Such an action requires an EIS.

95. The following are both general and specific examples of some of the requirements which would be preempted under AT&T's request and which must be covered by an EIS. Based on

experience and better knowledge, the construction requirements of state and local governments for construction or work in the rights of way are now much more detailed than they were in the past. These include among other things, provisions on following state and local standards and manuals of uniform traffic control devices when entities are working in the rights of way; provisions to protect fragile soils or other environmentally sensitive areas (such as when working on roads on slopes or in other environmentally fragile areas); requirements for work in the rights of way in or near wetlands, streams, ponds, and rivers; and safety related requirements under state and local equivalents of OSHA.

96. Some requirements are more of an aesthetic nature, especially those relating to work on streets or highways in historic areas (which are present in many communities in the United States).[12]

97. An evolving set of requirements relate to utility crowding and the efficient use of increasing congested public rights of way. These include provisions requiring a provider excavating a street to install extra blank conduit so as to prevent needless excavation of the same right of way in the future and to readily allow its use for additional wires or by new providers; relocation provisions such as those described above (which also aid appropriate usage of the right-of-way by additional providers); requirements for removal of obsolete facilities not being held for future use; and requirements for ingress to buildings from side or rear streets in areas where there is congestion in the utilities in the street on which the building fronts.

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[12] As noted above, an EIS is required for Federal action affecting highways listed or eligible for listing in the National Register of Historic Places.

98. Environmentally related requirements include many of the construction related items described above. They also include restrictions and requirements on trimming trees, shrubs, and other vegetation in the rights of way, and requirements on landscaping and reforestation.

99. A significant requirement relates to the National Pollution Discharge Elimination System (NPDES) where strict requirements are imposed by states and local governments (not the Federal government) to prevent soil and sediment from washing into sewers or storm drains from construction in the public rights of way. Such pollution often flows directly from storm drains into waterways. States and municipalities often impose soil erosion and sedimentation control ordinances both to prevent such pollution and because as the owner of the storm sewer facilities in question (and holder of an NPDES stormwater discharge permit for them) states and municipalities are financially responsible for controlling pollution discharges from storm sewers.

100. The following are examples from just one of the fifty states (Michigan) of some of the environmentally related authority which that state has specifically given to local municipalities. It does not set forth the general authority to impose environmentally related measures which many municipalities have under their authorizing statute or charter. Many if not most states have analogous statutes or authority conferring both specific authority and general authority on municipalities to impose environmentally related requirements appropriate to local conditions. Michigan's Soil Erosion and Sedimentation Control statute, MCLA §§ 324.9101 and following, dates in part from 1970. In general, this statute prohibits any "human-made change in the natural cover or topography of land, including cut and fill activities, which may result in or contribute to soil erosion or sedimentation of the waters of the state" without prior approval under the Act. Id.;

MCLA § 324.9112. Such approval may be obtained from a city, village or charter township which has adopted an appropriate soil erosion and sedimentation control ordinance. Id. Most Michigan municipalities, as a result, have adopted such an ordinance which applies, among other things, to construction in the public rights-of-way.

101. Michigan's Wetland Protection Act, MCLA §§ 324.30301 and following, generally prohibits construction, operations or development in a wetland. MCLA § 324.30304. This includes placing fill in wetlands, dredging them or draining water from them. *Id.* This act as well dates back in part to 1970. It has an exemption for the "maintenance, repair or operation of electric transmission and distribution power lines" under certain circumstances, but no such exemption for telecommunications providers. MCLA §§ 324.30305(2)(l) and (m).

102. Michigan's Natural Beauty Roads Act dates in part from 1948. See MCLA §§ 324.35701 and following. In general, it allows 25 or more residents to petition a municipality to designate a road as a natural beauty road, in which case construction and the cutting of native vegetation is substantially restricted. MCLA §§ 324.35702 and 324.35704. For example, no construction or substantial damage to native vegetation is allowed without prior municipal approval, which includes a notice and public hearing. Id. However, the restrictions in question do not apply to a public utility's right to control vegetation affecting facilities that were there prior to a road receiving its natural beauty designation. Id. In general, however, telecommunication providers contend that they are not "public utilities" under Michigan law.

103. The Michigan Natural Rivers Act establishes natural and scenic rivers. MCLA §§ 324.30501 et seq. It restricts essentially all manmade intrusions in, under, over, or on the banks of rivers so designated. It dates back to 1948.

104. Finally, the Michigan Sand Dune Protection and Management Act is part of a class of statutes which restrict development on steep slopes, such as on critical sand dunes or other environmentally sensitive areas.[13] MCLA § 324.35301. Among other things, the Sand Dune Protection and Management Act prohibits construction, including utility construction, without special permits in areas "that [have] a slope steeper than a one foot vertical rise in a three foot horizontal plane" or that is likely to increase erosion or decrease stability. MCLA § 324.35316. This Act, in part, dates from 1976.

105. By adopting a rule like that requested by AT&T, all of these (and other) state and local environmental regulations (such as mapping, insurance and indemnity requirements) would be preempted if there was a telecommunications provider operating in the area prior to the middle portion of the twentieth century. That would allow telecommunication providers to construct facilities in wetlands, along natural beauty roads, across natural rivers, up and down critical sand dues and on highly erodible lands adjacent to waterways, and to clear vegetation around such facilities, without regard to the environmental impact of such activity. There are dozens of other environmental regulations in each of the other forty-nine states (and in the thousands of local

[13] The western shore of Michigan's lower peninsula contains the world's largest moving sand dunes which are up to 600 feet high, several miles across and generally have steep slopes. Certain portions are part of a National Lakeshore administered by the U.S. Park Service or are part of state parks. Most portions, however, are privately owned and are only regulated by this Act.

governments nationwide as well). It is the Commission's obligation as part of the EIS process to survey those laws and regulations that would be preempted should any portion of AT&T's request effectively become a Commission Rule. A comprehensive EIS is required.

106. Financial, Legal, and Technical Ability. Commenters such as SBC, AT&T, and GTE criticize local regulations that require applicants for right-of-way permits to include evidence of their financial, legal, and technical ability to originally construct facilities and then maintain them in working order. To the contrary such requirements (as well as checking a provider's actual track record on right of way related matters) are essential to protect the public health and safety.

107. In the past local units of government typically dealt with one telecommunications provider which had great financial strength, much technical ability and substantial right of way experience. Now many new telecommunications providers are installing lines in the right of way. Many of these providers are start ups with small balance sheets and few assets (or few unencumbered assets). Many have little or no technical experience in right of way matters and may or may not have a checkered track record on right of way matters. Local governments under these circumstances must make sure that providers have the requisite financial, legal and technical capacity to properly construct facilities in the rights of way and to maintain them appropriately. This includes checking the provider's track record on such matters. If the provider lacks such capabilities either the facilities (such as lines, poles or power supplies) will not be installed properly or will not be maintained properly and will lead to risks to the public and traveling public due to wires being strung too low, objects falling off poles or damage to adjacent utilities (see the MCI-Detroit disaster described below).

108. Relatedly, municipalities must make sure that a new provider, either directly or by insurance, is able to financially compensate members of the public for harm which the provider causes them, such as due to improper construction or maintenance of its facilities in the rights of way. If a provider is effectively "judgement proof" its incentive to properly construct its facilities so as to reduce the risk of harm to the public is appreciably reduced. Relatedly, as "deep pocket defendants" if a provider does cause harm to the persons in the rights of way but is judgement proof the injured party is likely to sue the municipality under a "joint tort feasor" concept for resulting harm. Any resulting damage claim that is paid by the municipality (and which should have been paid by the provider) diminishes the units of government's ability to provide essential services to protect the public health and safety.

109. One example of the harm that can be caused by telecommunications providers in the rights of way comes from the northern suburbs of Detroit in the spring of 1999. Contractors for MCI severed a major water main servicing many northern Detroit suburbs. These suburbs were totally without water for some time and due to contamination introduced into the water mains did not have drinking water for several days. As a result, two major automotive assembly plants (General Motor's Orion Assembly Center and its Buick City large car factory in Flint) were closed, as was Daimler-Chrysler North American Headquarters with over 11,000 employees, all area schools, a major regional mall (Great Lakes Crossings) and hundreds of other businesses. Hundreds of thousands of residents were without water for several days, and millions of dollars were lost. "Water Can't Cool Anger in Oakland" *The Detroit News*, June 11, 1999, pp 1 and 3. One city declared a state of emergency due to concerns about the danger of fighting fires with little or no

water. "Auburn Hills Declares Emergency", The Detroit News, June 10, 1999, p 13A. Many lawsuits (including class action lawsuits) have been filed against MCI and its contractor as a result of the water main break alleging injury, property damage, economic loss and a variety of other claims and requesting millions of dollars in damages. Although there appear to have been no fatalities, the widespread and pervasive nature of the harm caused by this single act by a telecommunications provider illustrates the impact on the public health, safety and environment that can occur from matters relating to the right of way.

110. For the preceding reasons local governments must be able to examine the financial, legal and technical ability of telecommunications providers, their track record of performance on right of way matters and where necessary impose appropriate restrictions or conditions (e.g.–obtaining insurance). Restricting municipalities in this regard would adversely affect the public health and safety. An EIS is required.

111. Location of Facilities Within the Right-of-Way. Cox Communications, Inc. ("Cox") in its comments objects to local requirements that regulate the location of emergency back-up power supplies within the right-of-way. Comments of Cox Communications, Inc., October 12, 1999, at 15. Cox was referring specifically to diesel or gasoline-fired generators. Cox objects in particular to a local regulation requiring that such equipment be placed underground.

112. The primary purpose of rights-of-way is to allow safe movement of vehicles and pedestrians. Local governments are charged with keeping such rights-of-way safe. Structures placed within the rights-of-way tend to be inconsistent with safe travel. Vehicles that leave the traveled surface of roads (which they tend to do for a variety of reasons including weather,

malfunction of the vehicle, driver error, drivers falling asleep or drivers operating under the influence of alcohol or drugs) have a substantially higher chance of collision and serious injury when there are structures within the right-of-way. If a local government is not able to regulate the location of backup power supplies, then providers are more likely to locate them where it is easiest and cheapest to install and maintain them. This will almost always mean a location that is above ground in close proximity to their lines–and close to the traveled portion of the highway. As this increases the risk of injury to motorists, an EIS is required on Cox's request.

113. Length of Time for Reviewing Permit Applications. The Association of Local Telecommunication Companies ("ALTC") and McLeodUSA. Inc. ("McLeod") believe that the Commission should adopt rules limiting the amount of time that municipality has to evaluate an application for a permit or consent to use the right-of-way. These and other commenters believe that 30 days is presumptively reasonable. Comments of the Association of Local Telecommunication Companies, October 12, 1999, at 8; Comments of McLeodUSA at 4. SBC in its Reply Comments believes that this is "too long in newly competitive markets." SBC Reply Comments at p 5.

114. In general the permission to use the local rights of way can only be granted by the legislative body of a municipality. The largest units of local governments (e.g. population one-quarter million or more) may meet weekly; the majority of municipalities meet every two weeks and many of the smallest units of government meet only once per month. In Michigan, as in most states, a local government can only act through its legislative body at a public meeting that has been properly scheduled and noticed. Agendas need to be adopted and packets distributed to individual members of the legislative body (e.g.–city council members) in advance. In addition, states and

local units of government have "publication" requirements (analogous to publication in the Federal Register) which if applicable to a given request require publication in a paper of general circulation in the municipality. Depending on whether the newspaper is daily or weekly and lead time requirements it may take ten days to arrange publication and to provide adequate opportunity for citizen input and comments. State laws also frequently require that legislation be considered at two or more readings of the legislative body prior to enactment (i.e. at two consecutive city council meetings).

115. Aside from formal procedural requirements a thirty day time frame in many if not most cases would be simply inadequate for a thorough review of the provider's application, especially for applications that request authority to locate telecommunications facilities on many or all roads and highways within the municipality. Does the Commission seriously believe that cities the size of Los Angeles or New York in thirty days could review all the engineering, health, safety and environmental matters related to an application by a telecommunications provider to constructing lines throughout all the streets and highways in these municipalities? More generally, in reviewing the provider's application municipalities must make sure that the proposed location of facilities will not conflict with current facilities, that appropriate environmental safeguards are in place and often conduct a street by street, foot by foot review of engineering plans to this end. Related goals from reviewing a permit request include identifying alternate routings which may require less construction, have fewer environmental consequences or would prevent cuts in the surface of streets which would significantly decrease the life of the street and necessitate its early

replacement. Such reviews are done purely for engineering related health and safety reasons. Such reviews generally cannot be completed in thirty days.

116. The engineering related safety reviews which cities must conduct and state law procedural requirements to afford due process and allow public input (such that, among other things, the public health and safety is protected) cannot be accomplished within thirty days. Preempting such requirements would have a direct impact on the public health, safety and environment. An EIS is required.

117. Mapping Requirements. SBC and GTE object to local regulations that require the provision of detailed maps of the location of their proposed or installed facilities. Comments of SBC Communications, Inc., *supra*, at 7; Comments of GTE, *supra*, at 9.

118. It is essential for units of local government to receive detailed maps of the location of facilities proposed to be installed in the rights of way. The maps are reviewed for the reasons described above. The provision of such maps protects the public health, the public safety and the environment by preventing one provider from conflicting with another, minimizing construction and reducing the need for premature rebuilds of streets.

119. Similarly, health and safety oriented requirements also include the provision of "as built" maps and their electronic equivalents (Geographic Information System (GIS) computer layers) upon completion of construction so that facilities in the rights-of-way can be quickly located and identified in the future. Such maps serve the obvious purpose of identifying where facilities are in the rights of way and protect the public health and safety by helping prevent one contractor (gas, sewer, water, telephone, cable electric) from damaging or destroying the facilities of another

provider. They are essential in the case of emergencies (such as water main, sewer main or underground gas or electric explosion) by assisting in the prompt identification of adjacent facilities such that they can be secured, protected and the damaged facility repaired. Such mapping provisions thus directly protect the public health, the public safety and the environment (by minimizing such items as water or sewer spills).

120. Prior to adopting the rule requested by SBC and GTE to preempt local map requirements an EIS is required.

121. Historic Highways. As described above, an EIS is required for Federal actions that may affect highways listed or eligible for listing in the National Register of Historic Places. There are many such highways and streets in Michigan and in other states ranging from the colonial era (*e.g.*, Williamsburg, Virginia; Mackinac Island, Michigan) to historic areas of more recent vintage. The matters discussed in the NOI would cover such highways. This Commission must conduct an EIS of the effect an order resulting from the NOI may have on such highways.

122. Preempt State and Local Taxes: The NOI at paragraphs 81 to 84 seeks comment "on the nature and prevalence of unreasonable or discriminatory [state or local] tax burdens on competitive telecommunications service providers" and on certain related taxes as a prelude to the Commission potentially preempting such taxes. In response telecommunications providers in their comments object to essentially all state and local taxes (property, sales/use, income, business, other). For example, AT&T effectively claims that the telecommunications taxation laws of essentially all fifty states are improper and should be replaced. See Comments of AT&T Corporation at page 30 and following. As described next, preemption of such state and local taxes may "significantly affect

the quality of the human environment" within the meaning of NEPA by depriving municipalities of the general fund revenues needed for municipal services affecting the quality of the human environment. An EIS is required.

123. Preempting state and local telecommunication taxes may have a material impact on the budgets of some units of local governments. This will be particularly the case where the revenues from such taxes are a relatively large portion of local government revenues (for example, where property tax, sales tax and income tax revenues are low or non-existent). In addition to the direct impact of preempting telecommunications taxes this Commission must consider indirect impacts where (for example) the preemption of taxes on telecommunications providers is likely to effectively invalidate other taxes. This may occur under state or local "uniformity of taxation" requirements or other tax non-discrimination requirements. For example, in Illinois a court was apparently invalidated the Illinois municipal telecommunications infrastructure maintenance fee as to all telecommunications providers because it found that applying the fee to wireless providers violated the uniformity of taxation clause of the Illinois Constitution. PrimeCo Personal Communications vs. Illinois Commerce Commission (Cook County, IL Case No. 98 CH 05500, January 11, 2000). Preemption of taxes on telecommunications providers could lead to similar rulings as to taxes applicable to electric utilities, gas utilities or property taxpayers generally, significantly increasing the impact on municipal revenues. Also, the impact of any tax preemption is increased to the extent the Commission takes action under the NOI that has the effect of reducing franchise (and other) fees paid by telecommunications providers.

124. A material decline in tax revenues can significantly affect a municipality's ability to deliver services that directly affect the quality of the human environment such as public safety services (police, fire, environmental disaster response, emergency medical service). Such services are typically funded out of general municipal funds (not out of restricted or enterprise funds, such as water or sewer revenues which, although large, typically are restricted in how such revenues may be used). Thus a decline in general municipal funds can directly impair such public safety services. As set forth in the CEQ regulations, adverse impacts on the public health and safety affect the quality of the human environment such that an EIS is required.

125. More generally, depriving municipal governments of appreciable revenues can generally affect the quality of the human environment in that unit of government in question. In recent decades lack of revenues contributed to problems in cities such as Newark, portions of Washington D.C. and the like, all of which had a harmful effect on the quality of the human environment for inhabitants of those areas.

126. For the preceding reasons the preemption of state and local taxes on which the NOI seeks comment may significantly affect the quality of the human environment. An EIS is required.

127. Compensation Practices: In the NOI the Commission seeks comment on the "compensation practices" of state and local governments regarding lines in the rights-of-way due to allegations raised by telecommunications providers and their associations as to such fees. The NOI seeks comments on how such practices and fees affect telecommunications competition. NOI paragraphs 1-17, 70-80.

128. Telecommunications providers generally object to fees (franchise fees, permit fees and other fees which they must pay to states and local units of government) and ask that the Commission enter a ruling which either directly or through its influence on the courts effectively preempts many or most such fees. Prior to acting on any such request, however, the Commission must prepare an EIS which evaluates the increase in the construction of telecommunications lines which would result, due to the environmental impacts of such increased construction. Such environmental impacts will be increased if and to the extent (as described in prior sections of this Petition) the Commission also adopts rules restricting municipalities' ability to protect themselves and their residents from the harms and consequences of the construction and operation of telecommunications lines in the rights of way. Further specifics are as follows.

129. A key element of the Commission's Notice of Inquiry is whether the "compensation practices" of state and local governments regarding telecommunication provider lines in the rights of way are impeding telecommunications competition. For example:

> "We also initiate an inquiry in order to compile a record on how State and local policy regarding telecommunications service provider's access to public rights-of-way and taxation of telecommunications providers and services may be affecting competition. . . . [O]ur consideration of these issues here is part of our ongoing effort to examine various possible impediments to such competition that come to our attention."

NOI at paragraph 1.

130. One major aspect of telecommunications competition is the construction of new lines in the rights of way. Such construction of new lines is a major focus of the NOI and the comments submitted in response to it. However, construction of telecommunications lines in the public rights of way causes adverse effects on the human environment. The following sections describe some

of the adverse environmental effects of telecommunications line construction which an EIS must consider.

131. The environmental effects of telecommunications construction are particularly pronounced when lines must be placed underground, streets must be excavated to install conduit, or where there are other closures or disruptions of the public rights of way. As examples of such effects, in a certain percentage of cases construction of lines in the public rights-of-way will lead to the breach of water, sewer, gas, steam or electric mains with resulting explosions (in some cases), harm to life and property, and contamination of streams or water supplies. A good example of this is the MCI disaster in suburban Detroit described above which deprived much of a major urban area of water service for the better part of three days with no potable water service for the area for that time, no water for fire protection for a portion of the time and a shutdown of schools, businesses and Daimler-Chrysler's North American headquarters for a significant period of time.

132. As a second example, often telecommunications providers do not appropriately "backfill" excavations they make in the rights of way resulting in subsidence which breaks the pipes, lines or facilities of other providers or harms the pavement above, in either case affecting the public health and safety.

133. Telecommunications providers attempt to avoid the preceding types of problems by using underground "directional boring" trades one problem for another: Such directional boring often punctures other facilities: Cities in Michigan have found directional bores that went directly through sewer or gas mains. Such bores frequently puncture high pressure gas mains as (for example) TCI did in the Denver area in 1995 where the resulting gas escaped through the soil into

adjacent houses and exploded, destroying several million dollar houses (fortunately in that case with no loss of life). See "Gas Lead Blows up 2 Homes, Damages 10," Denver Post, March 15, 1995, page 1. A similar incident occurred in Westminster, Maryland due to construction by Prestige Cable, resulting in damage to eighty-eight (88) homes. Multichannel News, January 30, 1995, p. 12. Finally, directional boring does not result in good "as built" maps of where the bore in fact is, particularly in a vertical elevation. Subsequent providers wishing to use the same rights of way are faced with a difficult choice of attempting a subsequent bore which may hit the first bore (potentially causing health and safety impacts, and in any event requiring excavation of the street) or using conventional excavation to install their lines.

134. Some municipality's "compensation practices" include engineering or permit type fees which are necessary to cover and fund a municipality's cost of assuring the public safety regarding the public rights of way (such as by reviewing and issuing permits for work therein, insuring compliance with applicable safety codes, obtaining as built maps of completed work and integrating it with maps of other facilities in the rights of way). The public health and safety will be directly impacted to the extent such fees are invalidated or reduced with a consequent reduction in the municipal safety and enforcement activities just described.

135. Some fees charged telecommunications providers are a direct recoupment of the costs they cause a municipality due to work in the rights of way, including (most notably) the extra cost due to reduced life of the public rights of way due to repeated pavement cuts. Briefly, a street without pavement cuts may have a useful life of twenty to thirty years. This useful life can be cut in half or less by repeated pavement cuts because such cuts affect the integrity of the structure of

a street no matter how well the cut is filled or "patched". Some fees charged providers directly compensate municipalities for the increased costs they incur as a result (for example, having to repave a street twice as often as expected). To the extent such fees are preempted as a result of any Commission order the public health and safety will be directly impacted by reducing the funds available for street repair and restoration. The result will be an increase in the number of deteriorated streets which then directly affects the public health and safety by increasing traffic times, increasing congestion and delaying emergency vehicles responding to fires, heart attack victims, crimes and the like.

136. The preceding are simply some examples of the types of problems affecting the quality of the human environment that can result from the construction of telecommunications lines. Prior to adopting any order which by restricting the "compensation practices" of municipalities aids the construction of more telecommunications lines the Commission must prepare an EIS on the environmental impacts of such increased construction. Again, these environmental impacts will be increased to the extent the Commission adopts an order or makes statements (such as those requested by telecommunications providers in this proceeding) which hamper or affect a municipality's ability to manage its rights of way and limit or control those facilities installed therein by telecommunications providers.

Conclusion

137. The rule proposed in the NOPR if adopted in whole or in part could significantly restrict the requirements which members of Municipal Petitioners and other municipalities nationwide may impose on telecommunications providers. Rules adopted pursuant to the NOI could

have a similar effect. Municipal Petitioners have shown how preempting these requirements both directly and indirectly may have profound environmental, health, and safety impacts nationwide and affect historic highways. For this reason the Commission must conduct an Environmental Assessment and prepare an Environmental Impact Statement.

138. The Environmental Assessment and EIS processes must be conducted in conformance with the requirements of the CEQ which include public input and comment, and in particular coordination with and participation by affected units of state and local government. The entire environmental process at the Commission must be conducted so as to have a practical input into the Commission's decision-making processes such that alternative causes of action are identified and environmental effects minimized. In particular, this includes identifying with specificity any

potential conflicts with environmental, health, or safety requirements relating to the public rights-of-way of state and local governments and minimizing such conflicts.

Respectfully submitted,

National League of Cities
National Association of Counties
Michigan Municipal League
Texas Coalition of Cities for Utility Issues

By: 
John W. Pestle
Matthew Zimmerman

Their Attorneys

Dated: August 16, 2000

BUSINESS ADDRESS AND TELEPHONE:
Bridgewater Place
333 Bridge Street, N.W.
Grand Rapids, MI 49504
(616) 336-6000

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